Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No. 92-266
Act of 1992	)	
	)	
Rate Regulation	)	

REPLY COMMENTS OF CONSUMER FEDERATION OF AMERICA

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I. INTRODUCTION

CFA[1] hereby submits these reply comments in the above captioned proceeding. Rather than restating the views we presented in our initial comments, we will instead highlight for the Commission the cable industry's misinterpretations of the 1992 Cable Act and point out key admissions in cable industry comments which support CFA's proposed cable regulatory model.

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[1] Consumer Federation of America (CFA) is a federation of 240 pro-consumer organizations with some 50 million individual members. Since 1968, it has sought to represent the consumer interest before federal and state policymaking and regulatory bodies.

If the Commission ever wondered why Congress felt it necessary to draw special attention to the need to prevent "evasions" of this statute, the Commission need look no further than to the cable industry's[2] comments in this proceeding. By urging the Commission to implement a law that does not exist (i.e., H.R. 1303 and similar "substitute" amendments that were defeated by both the Senate and House), the cable industry demonstrates its desire to evade the actual statute that Congress enacted.

Disregarding clear statutory directives and grossly mischaracterizing Congress' intent, the cable industry's misreading of the 1992 Cable Act renders its regulatory proposals illegal and laughable. In addition we point out how, despite its extensive effort to mischaracterize the past and present economics of the cable marketplace, the cable industry nonetheless acknowledges key facts which support CFA's proposed regulatory model.

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[2] Since comments representing cable television industry interests presented virtually identical misrepresentations of the Act in their filings, we refer to them as one, citing specific examples of their claims.

II. ERRORS IN INTERPRETING THE LAW'S RATE REGULATION REQUIREMENTS

It is certainly not surprising that the cable industry proposes a regulatory scheme which is totally one-sided in favor of cable operators, and presents a view of rate performance that denies virtually all of the abuses Congress found in passing the Cable Act. It is surprising, however, that the industry comments completely ignore fundamental regulatory directives that Congress enacted.

Cable industry comments have manufactured a rate regulatory statute that does not exist and urged the Commission to implement "it" in a manner that does not comport with the 1992 Cable Act's regulatory directives. The industry has:

- dramatically understated cable programming service regulation,
- misdefined the types of equipment subject to regulation and mischaracterized the approach to regulation Congress intended,
- diluted the key function of the evasions provision,
- disregarded the Act's clear prohibition on marginal cost pricing, and
- mischaracterized Congress' intent with respect to basic tier services.

The result is that the cable industry proposes a regulatory model that directly violates the goals and language of the Act. The

industry's regulatory scheme would deny consumers virtually all the protections Congress mandated.

The highlight of cable's misreading of Congress' intent -- besides declaring "open season" on consumers to raise rates endlessly -- is the industry's call for a "grace period" before rate regulation takes effect. Given cable's track record of raising rates even after Congress passed the Act, this proposal should be named the "fleece period" and rejected out of hand.

A. THE CABLE INDUSTRY'S "OUTLIER" BENCHMARK APPROACH IS ILLEGAL BECAUSE IT IS BASED ON A VIEW OF THE CABLE MARKET THAT WAS CLEARLY REJECTED BY CONGRESS IN THE CABLE ACT OF 1992

The cable industry relies upon a series of characterizations and statements about "cable programming service" which do not reflect the legislative compromise between the House and Senate bills that we described in our initial comments. For example, the Act's "unreasonableness" standard for regulating cable programming services is referred to as an "egregiousness" standard by numerous cable companies.[3] However, the term "egregious" does not appear in the Conference Report or House and Senate Committee Reports. The only place anything like this term appears is in an earlier version of cable legislation, H.R. 1303,

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[3] See e.g., Comments of Time Warner at 38,40, Comcast at 32-33, TCI at 27.

which the Congress voted down en route to passing the 1992 Cable Act. Clearly, "unreasonable" does not mean "egregious."

Similarly, the cable industry attempts a classic "sleight of hand" when it associates Senator Inouye and Representative Markey with the industry view that only "outliers" (i.e., the 2-5% of cable systems with the highest prices) should be subject to evaluation by the Commission under the Act's complaint process. To reach this conclusion, the cable industry applies the following creative logic: 1. In introducing cable legislation, Rep. Markey referred to "bad actors" and "renegades;" 2. the House Committee Report indicated that no more than 49"% of cable systems are "bad actors;" 3. Sen. Inouye spoke about "bad actors" on the Senate floor prior to passage of S. 12 and the Conference Report;[4] THEREFORE the Commission may only consider regulatory action involving complaints filed against the 2-5% of cable systems with the highest rates.

Cable industry filings use a variety of phrases to describe this view of Congressional intent. They claim Congress intended for the Commission only to regulate ". . . rates so far from the norm as to be clearly abusive . . .,"[5] ". . . only as a way to

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[4] See e.g., Comments of TCI at 6-7, 27, 29, Continental Cablevision at 49, Time Warner at 41, Comcast at 34-35.

[5] Comments of TCI at 38.

catch the bad actors that charge egregious rates,"[6] ". . . in extraordinary circumstances,"[7] using benchmarks that ". . . are not, even presumptively, a limit on what the cable operator can charge."[8]

However these characterizations are simply perversions of Congressional intent and particularly disingenuous descriptions of the legislative sponsors' views about cable regulation. Although Sen. Inouye did refer to "bad actors," his comments were in reference to the reasonableness standard for cable programming service in S. 12 and are not in any way supportive of the House Committee Report. In describing what S. 12's reasonableness standard is designed to accomplish, Sen. Inouye said:

> This legislation has two goals: To promote competition in the video industry and to protect consumers from excessive rates . . .
>
> To ensure that the regulation in this bill is meaningful, S. 12 requires that if less than 30 percent of the subscribers take the basic tier, the FCC's guidelines will apply to the next most popular tier to which 30 percent subscriber . . .

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[6] Comments of Time Warner at 38. Time Warner also urges the Commission to effectively disregard the six factors explicitly contained in the Act which the Commission is required to consider: ". . . adoption of a mechanism to identify only those cable operators charging egregious rates will implicitly 'consider' each of the six factors enumerated in Section 623 (c)(2) and thereby discharge any and all obligations the Commission may have in this context." Id. at 40, note 101.

[7] Comments of Time Warner, Kelley Attachment at 5.

[8] Comments of Cox Cable at FN 20.

> . . . recent practices of the cable industry demonstrate that the consumer would not be protected if only the basic tier were regulated . . . Our bill . . . will give the FCC the authority to protect consumers against excessive rates for the most popular tier of programming.[9]

Similarly, the cable industry misstates the meaning of "bad actor" from Sen. Inouye's perspective, when referring to the Senator's description of the Conference Report: "In addition both S. 12 and the conference report include what could be called a bad actor provision. The conference report provides that the FCC may regulate, on a case-by-case basis, rates for tier of programming other than basic if it receives a complaint that demonstrates that a rate increase is unreasonable."[10] Clearly the Senate's lead Democratic sponsor of the Cable Act believed that regulation of "bad actors" and "excessive rates" involved the reasonable rate standard taken from S. 12 and slightly modified in the Conference Report -- not the cable industry's 2-5% of "outliers."

Also, Rep. Markey's reference to "bad actors" and "renegades" is in no way supportive of the cable industry's description of "outlier" regulation. It is important to remember that after Rep. Markey made the statements that the cable

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[9] 138 Congressional Record at S561 (Jan. 29, 1992, statement of Sen. Inouye).

[10] 138 Cong. Rec. at S14224 (Sept. 21, 1992, statement of Sen. Inouye) [emphasis added].

industry cited, numerous amendments were added to H.R. 4850 in the Energy and Commerce Committee and, most importantly, in the Conference Committee, that significantly altered Rep. Markey's original legislative approach. As we pointed out in our initial comments, the Conference Report changed the House bill's rate provisions in the following fundamental manner: 1.) a reasonableness standard, defined as no more than competitive market rates, was added to limit basic tier prices in a manner that parallels the unreasonableness test for cable programming service; 2.) the factors to be considered for regulating basic and cable programming service rates were modified to make them more similar and to prevent loading excessive costs in basic or cable programming tiers; 3.) complaint filing for cable programming service was modified to make it more expansive (i.e., subscribers may file a "minimum showing") and 4.) the evasions provision was expanded to ensure that retiering of cable programming service would not harm consumers.[11]

Since Rep. Markey supported these changes in his original legislation, his views of what is a "bad actor" or "renegade" must have evolved over time. Most importantly, Markey's statements in no way support the cable industry's claim that an extremely limited universe of "outliers" should be subject to

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[11] See Comments of CFA at 6-10.

cable programming service regulation.[12] Finally, as we pointed out in our initial comments, the House Committee Report's reference to a "minority" of cable operators abusing consumers was superseded by the Conference Report's numerous strengthening amendments to the House bill's rate provision.[13]

B. THE INDUSTRY'S PROPOSALS ON REGULATION OF EQUIPMENT ARE IN CONFLICT WITH THE PLAIN LANGUAGE OF THE LAW

1. COST-BASED REGULATION OF EQUIPMENT EXTENDS TO ALL EQUIPMENT USED TO RECEIVE THE BASIC TIER

Cable industry filings claim that under § 623(b)(3), cost-based regulation was meant to apply solely to the equipment used only by basic tier subscribers. This interpretation is at odds with the plain language of the Act and completely ignores the

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[12] The cable industry's distortion of legislative history is matched only by its perversion of the English language. Repeated references are made to rates that violate the industry norm (Time Warner at 43, 46; TCI at 58). The word norm is brutally abused by the industry to include rates as far as two standard deviations above the mean. In the arithmetic sense, the word norm means average, median or most typical value.

> Norm: ...average;... a set standard of development or achievement usually derived from the average or median achievement of a large group... the average score of a specified class of persons on a specified test... a pattern or trait taken or estimated to be typical behavior of a social group because most frequently observed (Webster's Third New International Dictionary (Merriam Webster, Springfield Mass., 1986).

[13] See Comments of CFA at FN 8.

Conference Committee's amendments made to the House and Senate bills.

The plain language of the Act indicates that all equipment used by subscribers to receive the basic tier, including converter boxes and remote control units, must be regulated in a cost-based manner.[14] CFA believes this indicates Congress' intent to apply cost-based regulation to all equipment used to receive other services in addition to basic service. CFA's interpretation is further supported by legislative history, wherein the express reason cited by Congress for the change in the House bill's language was to increase the Commission's authority, not to dilute it as the cable industry suggests.[15]

The Conference specifically rejected the language "equipment necessary by subscribers to receive the basic tier service tier" and substituted it with "equipment used by subscribers to receive the basic tier, including a converter box and remote control unit..."[16] Several commenters claim this language change was not meant to be substantive, but rather intended to make this language mirror other parts of the Act. This claim is ludicrous in light of Congress' statement that the change in language was

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[14] If a subscriber requests, this would include an addressable converter box or other equipment necessary to receive programming on other service tiers. § 623(b)(3).

[15] Conference Report at 64.

[16] § 623(b)(3). (emphasis added)

meant to "give the FCC greater authority to protect the interests of the consumer." (emphasis added)[17]

The cable industry relies on the language at § 623(1)(2) for its claim that cost-based equipment regulation was meant to apply only to equipment used by subscribers to the basic tier.[18] They say that because the language "used to receive..." is used both in reference to basic service and other cable programming services, one can assume Congress' intent was to limit cost-based regulation. This reading ignores the fact that Congress expressly mentioned that cost-based regulation should be applied to equipment which is capable of being used for both basic and other program services, namely converter boxes and remote control units.[19] As one cable company noted,[20] it is a recognized

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[17] § 623 (b)(3). Furthermore, the language at issue does not mirror other language in the Act. It goes beyond the language found in § 623(1) defining "cable programming services" and includes specific equipment used for a variety of services.

[18] § 623(1)(2). That portion of the Act defines the term "cable programming service" to include equipment and installation used to receive this programming, "other than video programming carried on the basic tier...and video programming offered on a per channel or per program basis."

[19] § 623(b)(3)(A). No particular equipment is mentioned under cable programming services.

[20] Comments of Cablevision Systems Corporation at 6, note 8: See Clifford F. MacEvoy Co. v. U.S., 322 U.S. 102, 107 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment...Specific terms prevail over the general in the same or another statute which otherwise might be controlling'") (quoting D. Ginsburg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932)).

principle of statutory construction that specific terms in a statute will prevail over general ones.[21] CFA believes the statutory language indicates Congress' intent to limit the equipment which would not be subject to cost-based regulation.

CFA concurs with cable industry assertions that Congress did not intend to regulate equipment used solely for the purpose of receiving pay-per-view or "a la carte" programming. CFA also believes that equipment used solely to receive cable programming services should be regulated under the standards set forth at § 623(c). Finally, CFA believes Congress intended all other equipment to be considered as "used to receive the basic service tier"[22] under the Act, and subject to cost-based regulations.[23]

At best, the cable industry's strained reading of the statute would limit Commission authority to the level permitted under the rejected House Report language. At worst, it would limit the Commission's authority beyond the level intended under the original House Report language. In either case, the cable

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[21] Id. While the provisions at issue are not contradictory, in this instance, § 623(b)(3)(A) contains additional specific language mandating cost-based equipment regulation on equipment capable of being used to receive basic and other tiers of service, and the Commission should give effect to this language.

[22] § 623(b)(3).

[23] Claims by the industry that cost-based regulation of equipment will inhibit technological development are unfounded. Cost-based regulation allows cable operators to recover reasonable profits for equipment.

industry ignores the plain language of the statute and the expressed intent of Congress. The cable industry's interpretation must therefore be rejected.

2. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO CREATE AN EFFECTIVE COMPETITION TEST WITH RESPECT TO EQUIPMENT AND INSTALLATION

Several cable industry comments state that the Commission is free to adopt an effective competition test with respect to equipment and installation, because the Act contains no provision. CFA believes this conclusion is completely without merit. Neither the Act nor its legislative history demonstrates any intent on the part of Congress to condition cable equipment regulation. Therefore, the Commission has no authority to create such a test.

Furthermore, Congress mandated regulations by the Commission to promote commercial availability of converters and remote controls from vendors not affiliated with a cable company.[24] This indicates Congress' conclusion that competition does not currently exist in the equipment market.[25] One purpose of the

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[24] See Conference Report at 88-90.

[25] Several comments claim there is currently a competitive market for remote controls and converter boxes. Obviously, Congress disagreed since it directed the Commission to create cost-based equipment regulations for remote control units and converter boxes. At this time, so called "universal remotes" are

equipment compatibility provision is to bring competition to an uncompetitive market.

3. BUNDLING OF EQUIPMENT IS NOT PERMITTED UNDER THE ACT

The cable industry claims that various forms of bundling of equipment is not prohibited by the 1992 Cable Act. This is simply not the case. CFA believes any bundling of equipment, services or installation is inconsistent with the Act's language and purpose as well as simple logic.

Congress clearly intended that certain equipment be subject to cost-based regulation. For a subscriber to purchase or rent a single piece of equipment such as a converter box at cost, it would have to be available separate from all other equipment. By singling out converter boxes and remote control units, Congress' intent to make individual equipment available at cost is clear.[26] This does not mean a cable operator would be prohibited from offering a package of equipment at a single price in addition to offering each piece of equipment separately at cost.

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not capable of being used by the average consumer as an alternative to their cable system remotes. In addition, because of the equipment bundling practices of many cable companies, consumers are unable to rent equipment without the cable operators' remote control.

[26] § 623(b)(3). The same argument applies to installation and lease of other equipment or additional connections for television receivers, also specifically mentioned by Congress.

CFA's interpretation is further supported by Congress' intent to stimulate a competitive market for equipment through the equipment compatibility provisions in the Act.[27] The development of competition can only occur if consumers have the opportunity to rent or purchase equipment from more than one source. Permitting cable operators to bundle equipment and installation charges, even if each component of the bundled offering is priced at cost, effectively prevents a competitive market from developing.[28] Unless a subscriber can purchase a converter box from the cable operator without also purchasing a remote control unit, the fact that the consumer can purchase a remote control unit at a local electronics store is worthless. To meet Congress' intent under the 1992 Cable Act, CFA believes the Commission must prohibit any bundling of equipment, services or installation.

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[27] § 624A.

[28] Claims that some equipment, such as remote controls and converter boxes are useless unless sold together is simply wrong. Although CFA maintains that "universal remotes" are not yet competitive with cable operator supplied equipment, their commercial availability is evidence that a separate market for remote controls does exist. Furthermore, converter boxes can be operated by the buttons on the unit itself without a remote control unit.

C. BY MISDEFINING THE NATURE OF THE BASIC SERVICE TIER THE INDUSTRY HAS SOUGHT TO DIVERT THE COMMISSION'S ATTENTION FROM ITS FULL REGULATORY RESPONSIBILITIES UNDER THE LAW

Contrary to the Act's explicit terms, the cable industry claims Congress intended to create a broadcast-basic-only tier in every cable community. While acknowledging that cable operators may add any programming they desire to the broadcast and PEG channels in their basic tier, they nonetheless misconstrue what Congress meant by "low cost" basic. The industry claims: "The fundamental goals which serve as the common denominator of the Act's rate provisions are: (1) to induce (indeed, compel) the creation of a new option of a leaner 'basic' service, . . . (2) to place cable networks in optional tiers, . . ."[29] "The availability of a limited package of services that would be generally available to all subscribers at a low cost is one of the primary goals and achievements of the 1992 Cable Act."[30] However, Congress specifically rejected proposals (i.e., H.R. 1303, offered and defeated as an amendment to the House bill) to limit which programming operators could include in the basic tier.[31]

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[29] Comments of Continental Cablevision at 2.

[30] Comments of Cox Cable at 2-3, see also e.g., Comments of Cablevision Systems at 3, NCTA at 5-6, Time Warner at 4-5.

[31] Continental Cablevision's suggestion that the Commission's rate regulations are "force majeure" with respect to programming contracts is ludicrous in light of the literal language of the Cable Act (see Comments of Continental at 72).

In addition, the cable industry fails to note that Congress used the term "low priced" in conjunction with directives to the Commission concerning cost allocation rules that prevent loading excessive costs on basic tier subscribers. As highlighted in our initial comments, Congress was most concerned about loading disproportionate costs on basic subscribers when cable operators add additional programming to the basic tier.[32] Congress did not impose a disincentive, as the cable industry claims, to add programming to the basic tier. Instead Congress imposed cost allocation limits and profit constraints to "keep the rates for basic cable service low."[33]

Congress did not define "low" as "subsidized" with costs shifted to cable programming service,[34] or refer to "low price" as a means of limiting the amount of programming in the basic tier. Congress used the term "low price" in conjunction with a reasonableness test for whatever amount of programming an operator puts in the basic tier.[35]

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[32] See Comments of CFA at 6-9, 91-92.

[33] Conference Report at 63.

[34] See e.g., Comments of Cox Cable at 24-28, NCTA at 38.

[35] In addition, the Act includes no limitation on basic tier regulation regarding the number of outlets or subscriptions a household purchases, contrary to the claims of some cable operators (see e.g., Comments of Cablevision Systems at 6). Congress called for regulation of all basic service tiers unless effective competition exists.

The error of misdefining what Congress intended about the basic service tier leads inevitably to a misplaced tension between basic service regulation and cable programming regulation:

> It reflects an assessment by Congress that the basic service tier, encapsulating the "antenna service" function cable systems perform, required direct regulation to promote localism and affordability. The governmental interest in assuring availability by regulating rates was deemed to diminish significantly in the case of cable programming, both because of Congress' perception of competitive levels as well as its recognition that the recent growth in cable network was largely due to the deregulatory policies of the 1984 Act....
>
> It is a valuable trade-off; constraining basic service tier rates to a reasonable benchmark permits freer rein for cable programming services because valuable consumer choices are inherently available in this scheme.[36]
>
> The tendency for regulation to include this kind of consumer harm can be countered in a number of ways. One way, discussed below, is to use a lighter hand in monitoring rates for non-basic services, to create a "safety valve" for highly valued and expensive services that would not be carried at the regulated basic rates.[37]

Congress intended no such trade-off.

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[36] Comments of TCI at 7-8.

[37] Id., Besen Attachment, at 17.

D. THE CABLE INDUSTRY FAILS TO RECOGNIZE THE CO-EQUAL STATUS OF THE EVASIONS PROVISIONS OF THE CABLE ACT

The cable industry incorrectly characterizes the Act's "evasions" provision as a virtually meaningless subsection, subservient to basic tier and cable programming service regulation. By viewing the provision as pertaining only to "certain implicit price increases" having nothing to do with the qualitative aspects of cable service, the industry dismisses "evasions" as superfluous in a benchmark system of regulation: ". . . if the Commission adopts a benchmark approach to rate regulation, then there is no need to adopt additional rules to prevent 'evasions'."[38] However, this interpretation of the Act disregards the Conference Report's explicit description of harm caused to ratepayers by retiering as an "evasion,"[39] and fails to account for the co-equal regulatory power the evasions provision shares with the basic tier and cable programming service regulation provisions.

While Congress did not require the Commission to regulate the specific content of cable programming, it did require the development of regulatory pricing rules that protect subscribers from harm when programming is shifted from the basic tier to

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[38] Comments of NCTA at 81-82, Time Warner 88-90.

[39] Conference Report at 65.

other tiers (i.e., to "cable programming service").[40] Obviously, Congress was concerned about the programming subscribers are most accustomed to receiving on the basic tier. As the cable industry itself points out:

> . . . satellite networks such as CNN, ESPN, Arts & Entertainment, MTV and The Weather Channel have typically been referred to generically as "basic" cable network, as distinguished from "premium" networks such as Home Box Office, Showtime and the Discovery Channel. The principal distinction was that premium networks were offered on a per-channel basis, while basic networks were offered only in a package. Thus, even when a system offered multiple tiers of service in addition to premium channels, these tier were often referred to as "basic" and expanded or enhanced "basic" service, and the satellite networks on each tier were still referred to as "basic" networks.[41]

It is this variety of cable programming that Congress found to be overpriced and therefore directed the Commission to regulate. Since previous Commission regulatory action could not prevent price increases caused by retiering,[42] Congress crafted §623(c), a cable programming service complaint process, and §623(h), regulation of evasions to ensure that subscribers are

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[40] See Comments of CFA at 9-11.

[41] Comments of NCTA at 37.

[42] 47 U.S.C. §543 (b)(1) discussed in Statement of Gene Kimmelman before the Senate Commerce Committee, March 14, 1991 at 2.